

No. 34224

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA

RICKEY DRAKE,

Plaintiff,

v.

Civil Action No.: 07-C-9

WACO OIL & GAS COMPANY, INC.,
a corporation,

Defendant.

CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF BRAXTON COUNTY, WEST VIRGINIA
THE HONORABLE RICHARD A. FACEMIRE, JUDGE

BRIEF OF THE DEFENDANT,
WACO OIL & GAS COMPANY, INC.

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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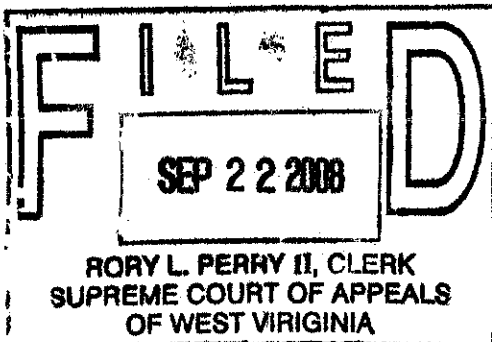


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**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

On the 30th day of January, 2008, the Circuit Court of Braxton County, West Virginia, entered an Order certifying the following question to this Court. The question certified and the response of the Circuit Court of Braxton County, West Virginia are as follows:

Where an oil and gas producer entered a lease for oil and gas production with one of two co-tenants, unaware of the ownership interest of the non-leasing co-tenant, produces gas pursuant to the lease and is then called upon by the non-leasing co-tenant to account, in determining the amount to which the non-leasing co-tenant is entitled is the correct measure the value of gas produced less reasonable costs of production or is the correct measure that portion of the royalty to which the non-leasing tenant would have been entitled had each tenant executed the lease.

Answer of the Circuit Court:

The correct measure of the accounting is the amount of royalty due pursuant to the lease.

In answering this question the Circuit Court has made the following findings and conclusions of law.

- (1) The Court **FINDS** that it is clear that it is "conceptually impossible" for tenants in common to trespass against one another, this action has evolved into a claim by the plaintiff for an accounting from his co-tenant with respect to monies received regarding the production of oil and gas. Eagle Gas Company v. Doran & Associates, Inc., 182 W. Va. 194, 387 S.E.2d 99 (1989). Accordingly, the only cause of action available to the plaintiff is one for accounting against the co-tenant.
- (2) An action for an accounting is permitted by West Virginia Code § 55-8-13 (1923). This statutory section permits an action of account between tenants in common for "receiving more than his just share or proportion".
- (3) The West Virginia Supreme Court of Appeals in McConaha v. Rust, 219 W. Va. 112, 632 S.E.2d 52 (2006) held that:

If a tenant in common uses the land for purposes allowed by law to a tenant in common but uses no more than his share and does not exclude a co-tenant, he is not accountable to him for rents and profits.

There is no evidence in this matter that the plaintiff was ever excluded from the property or that the co-tenant, Karen S. Drake, used more than her share of the property.

- (4) With respect to the plaintiff's claim for an accounting, the co-tenant, Karen S. Drake should account to the plaintiff for his just proportion of the royalty, which is the proper measure of damages for the allegation of waste. Smith v. United Fuel Gas Company, 113 W. Va. 178, 166 S.E.2d 533 (1932).
- (5) Likewise, the West Virginia Supreme Court of Appeals held in Sommers v. Bennett, 68 W. Va. 157, 69 S.E. 690 (1910), that an accounting between co-tenants should include all money received by the lessor/co-tenant from royalties accruing under the lease.

II. Statement of Facts

Generally, the defendant, Waco Oil & Gas Company, Inc., agrees with the Statement of Facts provided by the plaintiff in his petition previously filed herein. In this action there is no question that the oil and gas lease at issue is fair and reasonable and was entered into with the plaintiff's sister, Karen S. Drake in good faith.

Additionally, the plaintiff, Rickey L. Drake, on behalf of his sister, Karen S. Drake, negotiated with the defendant, Waco Oil & Gas Company, Inc., with respect to the lease agreement. The plaintiff, Rickey L. Drake, subsequently advised his sister, Karen S. Drake, that the lease was fair, reasonable and acceptable.

Accordingly, there is no issue presented in this action that any of the parties have acted with anything other than good faith and fair dealing toward the other. Further, the entry of the lease

agreement was an arms length transaction done with the full acquiescence, understanding and acceptance of the plaintiff, Rickey L. Drake.

III. Points and Authorities

State Cases

Eagle Gas Company v. Doran & Associates, Inc., 182 W. Va. 194, 387 S.E.2d 99 (1989)

Gallapoo v. WalMart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996)

McConaha v. Rust, 219 W. Va. 112, 632 S.E.2d 52 (2006)

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State Statutes and Regulations

West Virginia Code § 55-8-13 (1923)

IV. Discussion

A. Standard of Review

This Court's review of the Circuit Court's answer to a certified question is de novo. Gallapoo v. WalMart Stores, Inc., 197 W. Va. 172, 475 S.E.2d 172 (1996); Smith v. State of West Virginia Consolidated Public Retirement Board, 664 S.E.2d 686 (W. Va. 2008).

B. The Circuit Court of Braxton County Correctly Answered the Certified Question Submitted to it by the Parties.

This Court has previously held that it is conceptually impossible for tenants-in-common, with a mutual right to possession of the whole, to trespass against one another. Thaxton v. Beard, 157 W. Va. 381, 201 S.E.2d 298 (1973); Eagle Gas Company v. Doran & Associates, Inc., 182 W. Va. 194, 387 S.E.2d 99 (1989). However, co-tenants do have an action for accounting pursuant to West Virginia Code § 55-8-13 (1923).

West Virginia Code § 55-8-13 (1923) permits an action of account between tenants in common for "receiving more than his just share or proportion". There has been no evidence that the co-tenant, Karen S. Drake, has received more than her just share or proportion of the oil and gas owned by the plaintiff and his co-tenant.

The answer of the Circuit Court correctly determined that co-tenant, Karen S. Drake should account to the plaintiff for his just proportion of the royalty. This is the proper measure of damages for the allegation of waste. Smith v. United Fuel Gas Company, 113 W. Va. 178, 166 S.E.2d 533 (1932).

In Smith v. United Fuel Gas Company, 113, W. Va. 178, 166 S.E.2d 533 (1932), this Court relied upon its earlier decision of Cecil v. Clark, 49 W. Va. 459, 39 S.E. 202 (1901) stated as follows:

If a tenant-in-common takes possession of the premises to the exclusion of his co-tenant and leased the same to third-parties for the purpose of mining and removal of the coal therefrom, at a specified sum per ton, as royalty for the coal so removed, the co-tenant so excluded may require an accounting to him for his just proportion of such royalty as the proper measure of damages for such waste.

This Court went on to state that this principal of law governing the rights of co-tenants or tenants-in-common, with respect to waste seemed to be well settled in this State.

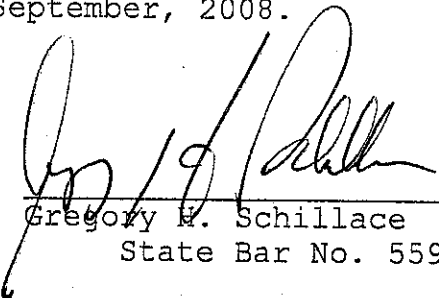
The defendant, Waco Oil & Gas Company, Inc., as lessee stands in the place of the co-tenant, Karen S. Drake, for the purposes of this proceeding. An action for accounting as was considered by the Circuit Court is between co-tenants. Accordingly, the co-tenant, Karen S. Drake, or the defendant, Waco Oil & Gas Company, Inc., standing in her place must account to the plaintiff for his proportionate share of the royalty received by Ms. Drake.

Likewise, this Court held in Sommers v. Bennett, 68 W. Va. 157, 69 S.E. 690 (1910), that an accounting between co-tenants should include all money received by the lessor/co-tenant from royalties accruing under the lease. Accordingly, the Circuit Court correctly determined that the plaintiff is entitled to an accounting from the royalty received by his sister, Karen S. Drake.

CONCLUSION

The Circuit Court of Braxton County, West Virginia, correctly answered the certified question, therefore, the defendant respectfully requests that the Circuit Court's decision be affirmed.

Dated this 19th day of September, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2008, I served the foregoing **BRIEF OF THE DEFENDANT, WACO OIL & GAS COMPANY, INC.** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Larry O. Ford, Esquire
Meyer & Ford
Post Office Box 11090
Charleston, West Virginia 25339

